



Commonwealth of Massachusetts

State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-92-22*

FACTS:

You are the Chairman of the Board of Selectmen (Board) of Kingston (Town). Ronald L. C. Maribett, a full-time employee of the Massachusetts Department of Environmental Protection (DEP), serves on the Board. The Board has raised several conflict of interest questions concerning Mr. Maribett's ability to participate in certain environmental matters coming before the Board.^{1/} The six major areas include questions about sewage treatment, landfill capping, earth removal permits, solid waste management and recycling, water supply, and appointments to town boards, committees, and commissions.

QUESTION:

Under what circumstances may Mr. Maribett participate as a Selectman in certain environmental matters in light of his DEP employment?

ANSWER:

Mr. Maribett may participate only in those matters which do not fall within DEP's purview or which are distinctly local in nature, as more fully described below.

DISCUSSION:

Although the conflict of interest law specifically provides that a state employee may hold any municipal position to which he may be elected or appointed, G.L. c. 268A, §4, the statute prohibits a state employee from acting as a municipal employee on "any matter which is within the purview of the [state] agency by which he is employed or over which such employee has official responsibility."

This is the so-called "municipal exemption" to G.L. c. 268A, §4, the agency section of the conflict of interest law. A brief background of the nature and purposes of §4 and the municipal exemption is necessary to answer your questions.

Section 4(c) of c. 268A provides that no state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the Commonwealth or a state agency for prosecuting any claim against the Commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

The restrictions of §4 reflect the principle that a state employee should not assist any non-state party in its dealings with state government by acting as that party's agent. *EC-COI-83-26*. A state employee's duty of loyalty is owed first and foremost to the Commonwealth, not to any other party on whose behalf he also works. *See Town of Edgartown v. State Ethics Commission*, 391 Mass. 83 (1984) (municipal counterpart); *EC-COI-92-4*. It makes no difference whether the individual, as a state employee, has any responsibility for the matter in question. The critical question is whether any agency of the Commonwealth has a direct and substantial interest in the matter.

Before 1980, §4 was interpreted to prohibit a state employee from holding municipal employment if the Commonwealth had a direct and substantial interest in the matters on which the state employee worked in his municipal capacity. *EC-COI-79-3* (state employee prohibited by §4 from holding selectman's position); *see also 79-123* (placing severe constraints on a state employee/selectman without reference to which state agency the

state employee served). In response to this broad application of §4, the Legislature amended the section in 1980 by adding a municipal exemption which permitted the dual service under certain conditions. St. 1980, c. 10.

The municipal exemption was enacted to permit a state employee, who holds municipal employment or a municipal office, to participate as a local official in all matters coming before him as long as those matters are not ones over which *his* state agency has jurisdiction, or, in the word's of the statute, are within its "purview." *EC-COI-83-26*; *86-2*; *92-8*. As a result, only a fraction of the matters in which the Commonwealth as a whole is interested are restricted under this exemption.² Thus, the 1980 amendment represents a substantial departure from §4's general application.

The municipal exemption's "purview" restriction serves three purposes. First, it eliminates the potential for undue state agency influence over those local officials who also happen to be its employees. For example, a state employee who also serves as a local official may be compelled by his superiors to carry out his agency's wishes concerning an important local issue, even if that policy is not in the municipality's best interests. Second, it avoids compromising state agency action where one of its own employees has pre-judged the issue at the local level. Finally, because the state employee is prohibited from participating, as a local official, on matters of interest to his state agency, he is protected from being placed in an awkward political and personal situation.

Because only those matters which are in a state agency's purview continue to be restricted under §4, the key to understanding the municipal exemption is the definition of the term "purview."

"Purview" is defined as the range or limit of authority, competence, responsibility, concern, or intention. *Webster's Ninth New Collegiate Dictionary* (1987). In practice, the Commission has found that the term purview includes any matter which is regulated, reviewed, or supervised by the state agency in question. *See EC-COI-86-2*; *83-26*; *82-89*. In *EC-COI-82-89*, the Commission prohibited an employee of the Department of Revenue (DOR) from holding the position of part-time Assessor in a town because the DOR Commissioner was empowered to enforce all laws relating to the valuation, classification, and assessment of property and to supervise the administration of such laws by local assessors (*citing* G.L. c. 58, §1A).

In other cases, however, the Commission has been able to discern subtle distinctions which have permitted the state employee to hold a local position even when there has been a substantial overlap with his state position. However, those employees have been cautioned to carefully observe all of the purview restrictions of the municipal exemption.

For example, in *EC-COI-86-2*, the Commission concluded that an employee of the Department of Environmental Quality Engineering (DEQE), now DEP, could serve on a local Board of Health, provided that he abstained on matters regulated by the DEQE. DEQE regulated subsurface disposal systems of greater than 15,000 gallons per day. The Board of Health was responsible for enforcing the state's sanitary code for subsurface disposal systems of up to 15,000 gallons per day. Notwithstanding that jurisdictional difference, the Commission held that all subsurface systems, regardless of size, were within DEQE's purview because the Board of Health *could* refer even the smaller size systems to DEQE. The Commission concluded, however, that the DEQE employee could participate in all matters "of a distinctly local nature. For example, permits to disposal companies or sewer hook-up requests by individuals would be considered local matters outside of the purview of DEQE."

Consequently, the state/municipal employee may participate as a municipal official if the matter in question is distinctly local in nature, or if it is otherwise not within the purview of his state agency. *See EC-COI-86-2*. As a general rule, the Commission will accord substantial deference to an agency's own determination that a matter falls within its purview. *Cf. EC-FD-89-1* (Commission must give substantial deference to agency making determinations as to who occupies a "major policy-making" position for purposes of c. 268B, the financial disclosure law).

With these principles in mind, we answer your specific questions below.

A. Sewage Treatment

First, DEP's jurisdictional basis for enforcing the Commonwealth's sewage treatment laws is quite broad. G.L. c. 21A, §13. The DEP Commissioner is empowered to adopt regulations which deal with matters affecting

the environment and the well-being of the public of the Commonwealth over which the department takes cognizance and responsibility including, but not limited to, standards for the disposal of sewage. *Id.*; *see also* G.L. c. 83, §6 (permitting town, with DEP approval, to take or purchase land for sewage disposal purposes).

Site selections on private or town-owned property are extensively regulated by DEP. *See, e.g.*, G. L. c. 21, §43. Consequently, site selections for sewage treatment facilities are matters within DEP's purview. Mr. Maribett may not, therefore, participate as a Selectman in discussions or votes concerning site selections for sewage treatment facilities.

On the other hand, we find nothing in the General Laws or in DEP's own materials which suggests that DEP has any regulatory oversight concerning the issue of the *financing* of sewage treatment sites when DEP is not otherwise involved. We find that, absent a state or federal grant, the financing of a sewage treatment facility is governed by provisions of municipal finance law (including, for example, G.L. c. 40, c. 44, and c. 59), and thus are not within DEP's purview. Mr. Maribett may, therefore, participate in discussions or votes concerning the financing of sewage treatment sites if DEP is not involved.

Mr. Maribett must exercise caution in two instances, however. First, if the matter before the Board is whether to seek DEP financing in the first place, he must abstain from any vote on, and from any discussions concerning, that financing. If the Board chooses not to request DEP's financial assistance (we understand that it is rare for DEP not to be financially involved), Mr. Maribett may participate in other financial aspects of the facility. If DEP's assistance is sought at any time, however, Mr. Maribett's participation in most, if not all, aspects of the facility must cease because of DEP's regulatory supervision in that case. DEP's jurisdiction over sewage treatment matters appears to be extensive once that agency is involved in the financial arrangements. Second, once the initial, pre-permitting phase is completed, DEP would likely become involved with the facility even if it provided no financing. Mr. Maribett's participation must, of course, cease at that time.

DEP's approval is a prerequisite for the operation of sewage treatment facilities. G.L. c. 21, §43. Design review and selection of those facilities are matters within DEP's purview. Therefore, Mr. Maribett may not participate in those matters.

Finally, if DEP must give ultimate approval to, or if it has any input in, the proposed requests for qualifications (RFQs) or requests for proposals (RFPs), then any matters concerning the RFQs or RFPs would be within DEP's purview. Generally, the development of RFQs and RFPs, as well as contractor selection, are not within DEP's purview, unless DEP is somehow otherwise involved in the process by statute, regulation, or practice. DEP involvement would result, for example, from its financing of a facility.

B. Landfill Capping

General laws c. 21H, §1(c) provides that

it is declared to be in the best interests of the citizens of the Commonwealth to enact legislation authorizing the department of environmental protection to provide financial assistance to public bodies for the closure of landfills or other solid waste facilities and for the expansion of landfill capacity or other solid waste facilities.

As a result, if DEP finances a landfill project, the landfill project would be within DEP's purview. If DEP does not provide the financing, the financing of the landfill project would not be within DEP's purview until the later DEP permitting phase. Therefore, Mr. Maribett may participate in the initial, pre-permitting stage if DEP is not involved. He must exercise caution if the Board were to later seek DEP financing in connection with landfill capping, and again when the permitting phase begins.

On the other hand, because of DEP's regulatory involvement in setting standards and monitoring municipal compliance, we find that project design review and selection are matters within DEP's purview. *See generally* G.L. c. 111 and c. 21H. Mr. Maribett may not, therefore, participate in project design and review selection for landfill capping matters. Furthermore, to the extent that financing decisions affect design review and selection, Mr. Maribett must abstain from participation on those matters.

Finally, if DEP must give ultimate approval to, or if it has any input in, the proposed requests for qualifications (RFQs) or requests for proposals (RFPs), then any matters concerning the RFQs or RFPs would be within DEP's purview. Generally, the development of RFQs and RFPs, as well as contractor selection, are not within DEP's purview, unless DEP is somehow otherwise involved in the process by statute, regulation, or practice. DEP involvement would result, for example, from its financing of a facility.

C. Earth Removal Permitting

We find that, except in certain instances, the earth removal permitting process is generally not within DEP's purview. *See* G.L. c. 40, §21 (17, 19) (towns are authorized to enact by-laws regulating earth removal); *but see* G.L. c. 131, §40 (placing certain state restrictions on removal, filling, etc. of land bordering waters).

Consequently, Mr. Maribett may participate in earth removal permitting matters where DEP is not concerned. This includes (i) the review of all applications concerning earth removal which do not fall within DEP's jurisdiction under G.L. c. 131, §40, and regulations promulgated under that statute (generally, DEP has no jurisdiction beyond Zone II or 100 feet of a wetland), (ii) the approval of earth removal applications for (i), above, (iii) the setting of conditions on earth removal permits for the above, and (iv) the enforcement of such earth removal permits.

D. Solid Waste Management and Recycling

If DEP does not finance a solid waste management and recycling facility, the financing of the facility would not be within DEP's purview during the initial, pre-permitting phase and Mr. Maribett may participate (unless, as indicated above, such financing matters affect determinations concerning the siting of the facility). He must exercise caution if the Board were to later seek DEP financing in connection with the project, and again when the permitting phase begins.

While we find that the siting of a solid waste facility is regulated by DEP, *see* G.L. c. 111, post-consumer drop off facilities appear to be exempt from DEP regulation by 310 CMR 19.013. Mr. Maribett may, therefore, participate in matters concerning the DEP-exempt facilities, including the review of facility design.

Finally, if DEP must give ultimate approval to, or if it has any input in, the proposed requests for qualifications (RFQs) or requests for proposals (RFPs), then any matters concerning the RFQs or RFPs would be within DEP's purview. Generally, the development of RFQs and RFPs, as well as contractor selection, are not within DEP's purview, unless DEP is somehow otherwise involved in the process by statute, regulation, or practice. DEP involvement would result, for example, from its financing of a facility.

We find that wage and personnel staff issues relating to solid waste management and recycling facilities are distinctly local matters. Mr. Maribett may, therefore, participate in those matters.

E. Water Supply

If DEP does not finance a water treatment or supply facility, the financing of the facility would not be within DEP's purview during the initial, pre-permitting phase. He must exercise caution if the Board were to later seek DEP financing in connection with the project, and again when the permitting phase begins.

However, the siting and maintenance of a water treatment or supply facility is regulated by DEP. Mr. Maribett may not participate in the operations of water treatment or supply facilities. *See, e.g.,* G.L. c. 111.

Wage and personnel issues related to the Town's Water Department are distinctly local matters. Mr. Maribett may participate in those matters.

F. Appointment to Town Boards, Committees and Commissions

We find that appointments to Town Boards, Committees and Commissions are distinctly local matters. Mr. Maribett may participate in appointments made to the Conservation Commission by the Selectmen, for example, even though the Conservation Commission must act on matters within DEP's purview. DEP has no jurisdiction over the identity or qualifications of a candidate for the Conservation Commission position. Merely because an

appointee will act on DEP-related matters is not sufficient to bring the appointment process itself into DEP's purview, unless some other condition also exists (a DEP statute or regulation establishing selection criteria, for example).

We must address several other relevant issues. First, we caution that DEP may, in practice, actually be involved in a project even though it has no statutory or regulatory role. The Commission would consider DEP's purview to extend to those matters as well, notwithstanding the lack of a regulatory basis.

Second, this opinion is limited to the matters specifically raised in your letter. Other projects, or other aspects of *these* projects, may require additional analysis. For example, as each of the above projects is finished, they may, as completed sites, facilities, etc., then fall within DEP's regulatory purview. We understand that DEP usually becomes involved in the permitting process in most, if not all, of these specified projects, thus bringing the projects into its purview at some later point. Mr. Maribett has indicated that he will remove himself from any discussions and votes once a project moves into the regulatory or permitting phase. Mr. Maribett's proposed course of conduct is both correct and necessary in order for him to comply with c. 268A.

Finally, Mr. Maribett should be aware of the restrictions of G.L. c. 268A, §6. That section prohibits a state employee from personally and substantially participating in any particular matter in which a business organization with which he is affiliated as an officer, director, trustee, partner or employee, has a direct or a reasonably foreseeable financial interest. Because a municipality is a business organization within the meaning of §6, *see EC-COI-82-25*, Mr. Maribett cannot, as a DEP employee, work on matters which will affect the Town's financial interest.

Section 6 does, however, provide a public exemption mechanism. The state employee's participation is permitted if his appointing authority gives prior written approval. For example, if any matter (or class of matters, *see EC-COI-90-4; 90-5*) to which a §6 financial interest applies comes before Mr. Maribett at DEP, he must fully disclose it to his appointing authority, the DEP Commissioner, in writing beforehand, even if he decides not to participate. The DEP Commissioner may then decide to allow Mr. Maribett's participation if he determines that this financial interest is not so substantial as will likely affect the integrity of Mr. Maribett's services to the state. §6(3). Copies of both Mr. Maribett's disclosure and the DEP Commissioner's determination must be filed with this Commission as public documents. Mr. Maribett should seek additional advice if he has further questions on this section.

Date Authorized: July 14, 1992

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

¹Mr. Maribett has joined in your opinion request. Mr. Maribett and Town Counsel also authorized the Commission staff to contact counsel for DEP to request assistance in answering your questions. Specifically, the Commission staff asked DEP to comment on whether any of the subject areas raised by your opinion request fall within DEP's jurisdiction. DEP responded by letter dated May 28, 1992. The Commission staff then contacted Town Counsel and asked counsel to respond to DEP's comments. Town Counsel responded by letter dated June 30, 1992.

²One aspect of the exemption somewhat limits its broad application, however. The exemption does not use the specifically defined term "particular matter," G.L. c. 268A, §1(k), but rather refers to "any matter." We believe that the Legislature's use of the term "matter" was intentional and was meant to comprise a broader class of restricted items not otherwise covered by the term "particular matter." For example, while "particular matter" may exclude legislative or managerial actions like the adoption of a budget, *Graham v. McGrail*, 370 Mass. 133, 139 (1976), the term "matter" could apply. Thus, the municipal exemption would not eliminate restrictions on legislative or managerial matters if those matters are within the purview of the state agency in question. This narrow construction of the municipal exemption is consistent with the Commission's obligation to construe all exemptions to the conflict of interest law narrowly. *EC-COI-87-2; 91-7*. *See also Department of Environmental Quality Engineering v. Town of Hingham*, 15 Mass. App. Ct. 409, 412 (1983).